The submission was, in my view, untenable on the facts. The crucial fact that was not fully appreciated by the plaintiff was that when the defendants entered into the option agreement what was given to them by way of plans was a location plan, a proposal plan (a bare sketch) and rudimentary data, including the proposed floor area per unit of the 32 units in the condominium. It was those floor area that were incorporated in cl 11 of the option as approximate floor areas. It was impossible at that time for the plaintiff or the defendants to know with any degree of certainty the area of the units in the plans that would be submitted or what would be finally approved by the competent authority. I agree with counsel for the defendants that the description of the units and the approximate floor areas stated in cl 11 was merely to identify the units which the plaintiff wanted to purchase. It must be so as at the date of the option, there were no detailed plans of the units, and the plaintiff had to stipulate by way of height, location and size the units she wanted for herself. I found that the words used in cl 11 were words of description and not words of limitation. For these reasons, I held the floor areas of the three units were to be taken from the actual site survey made of the completed units for the issue of the subsidiary strata certificates of titles and not those stated in cl 11 of the option.

Application dismissed.

Solicitors: *Lee & Lee; Tan Lee & Partners; Allen & Gledhill; Low Fook Cheng & Co.*

Reported by *Terence Tan Bian Chye*

Re Chong Lee Leong Seng Co (Pte) Ltd

HIGH COURT (SINGAPORE) - COMPANIES WINDING-UP NO 77 OF 1989
CHAN SEK KEONG J
26 JUNE 1989

Companies & Corporations - Oppression - Section 216 relief sought - Winding-up - Proceedings begun as winding-up petition - Application to strike out petition - Whether proceedings begun by proper method - Whether defect in starting proceedings a defect or mere irregularity - Companies Act (Cap 50, 1985 Ed), ss 216, 254, 255, 257, 258, 259, 260, 261, 262(3), 267 & 335 - Companies (Winding Up) Rules 1969, r 191 - Rules of the Supreme Court 1970, O 2 r 1, O 88 rr 2, 5 & 7 - Companies Act 1948 [UK], s 210(5) - Winding Up Rules 1949 [UK] - Companies Act 1961 [Aust], s 186 - Companies Act 1965 [Mal], ss 181, 186 & 221(2)(e) - Companies Act [Ghana], s 218

Civil Procedure - Winding-up petition - Whether proper to begin proceedings for relief under s 216 of Companies Act (Cap 50, 1985 Ed) by winding-up petition - Rules of the Supreme Court 1970, O 88 rr 2, 5 & 7

The petitioners were minority shareholders in the Chong Lee Leong Seng Co (Pte) Ltd ('the company'). They started proceedings against the company for relief under s 216 of the Companies Act (Cap 50, 1985 Ed) ('the Act'). The company applied to strike out the proceedings on the ground that they were wrongly started by a winding-up petition when the proper method was by originating petition.

Held, allowing the company's application and ordering that the petition be struck out:

(1) As 216 action under the Act is generally known as an action for oppression. One of the available reliefs as an alternative to others is the winding up of the company.

(2) The primary issue (which was whether proceedings under a s 216 petition which includes an order for winding-up are winding-up proceedings) raises an important question of substantive law as to the nature of an action (which includes the winding-up relief) under s 216 of the Act. Its importance lies in the ensuing legal disabilities and consequences upon the commencement of winding-up proceedings against a company, its shareholders and directors and also outsiders who have dealings with the company.

(3) There are good reasons why proceedings commenced under s 216 of the Act should not be regarded as a winding-up petition. This section departs significantly from the English and Australian antecedents. A criticism of the English antecedent was that the traditional remedy for oppression of the minority shareholders was to petition for a winding-up order. But this remedy was in many cases worse than the oppression. When the Ghanaian Companies Act was drafted, the corresponding section did not tie the oppression actions to winding-up petitions. Section 216 of the Act was modelled on this section of the Ghanaian Act.

(4) Consonant with the object of s 216, a court in Singapore will not wind up a company on the ground of oppression where any of the other reliefs provided therein is a sufficient remedy to bring an end to the matters complained of, notwithstanding Lord Wilberforce's statement in *Re Kong Thai Sawmill*[4] that the winding-up option ranks equally with the other reliefs.

(5) Section 216 as enacted has also expressly omitted the application of s 410(d) of the Act which provides for the making of rules generally for the winding up of companies to s 216. The

intention behind the omission is not to bring a s 216 petition within the terms of the Companies (Winding-up) Rules 1969.

(6) Section 216(3) provides that where a winding-up order is made pursuant to s 216(2)(f), the provisions of the Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the court by the company. The section does not expressly provide, as could have been done, that the petition is also deemed to have been presented at the date it is actually presented. Given the serious disabilities and consequences that follow upon the presentation of a winding-up petition, there is no justification for giving retrospective effect to the deeming words of s 216(3).

(7) It follows that until and unless the winding-up order is made, a s 216 petition when presented does not result in the commencement of the winding up of a company.

(8) A s 216 petition differs fundamentally from a s 254 petition in that under the latter, the petitioner is ex debito justitiae entitled to his order where he proves the facts to support the ground of his petition. In comparison, in a s 216 petition, the petitioner is not entitled as of right to wind up the company even where he proves oppression and the facts justify a winding-up.

(9) The petitioners were therefore in error in presenting the petition in these proceedings as a winding-up petition under the 1969 Rules. It should have been commenced and prosecuted as an ordinary companies' action by way of an originating petition as provided under O 88 r 5(h) of the Rules of the Supreme Court 1970.

(10) The petitioners, having begun their petition under the 1969 Rules, may only amend their petition under those same rules or the Act. They cannot rely on a different set of rules, namely, the Rules of the Supreme Court 1970, to set their petition right as the petition is not governed by those rules.

(11) The failure to use the right form to start the proceedings made the defect a nullity and not an irregularity. Rule 191 of the 1969 Rules did not assist the petitioners. Even if the defect were a mere formal defect or irregularity, substantial injustice had been done to the company by the unavoidable impression given to the public that winding-up proceedings had been commenced against the company.

(12) Neither was there any waiver by the company of the irregularity by its application to court for validation orders. For so long as the petition remains in the Registry as a winding-up petition, the company remains subject to all the statutory liabilities.

(13) For the above reasons, the petition would be struck out on the ground that it was improperly presented as a winding-up petition under the 1969 Rules. The petitioners were to pay the taxed costs of the application.

[*Editorial Note*: The petitioners have appealed to the Court of Appeal vide Civil Appeal No 85 of 1989.]

Cases referred to

1 *Re Australian Marinas (A'Asia) Pty Ltd* [1975] VR 372 (refd)
2 *Re Tennyson Minerals No-Liability* [1972] QWN 42 (refd)
3 *Re United Iron Mining Co Ltd* [1970] 1 MLJ 105 (refd)
4 *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (refd)
5 *Re Prichard* [1963] 1 Ch 502 (refd)

Legislation referred to

Companies Act (Cap 50, 1985 Ed) ss 216, 254, 255, 257, 258, 259, 260, 261, 262(3), 267, 335
Companies (Winding Up) Rules 1969 r 191
Rules of the Supreme Court 1970 O 2 r 1, O 88 rr 2, 5, 7
Companies Act 1961 [Aust] s 186
Companies Act [Ghana] s 218
Companies Act 1965 [Mal] ss 181, 186, 221(2)(e)
Supreme Court Rules [Mal]
Companies Act 1948 [UK] s 120 (s)
Winding Up Rules 1949 [UK]

Michael Khoo for the petitioners.
Davinder Singh for the applicant.

Cur Adv Vult

Chan Sek Keong J: This is an application by way of summons-in-chambers by Chong Lee Leong Seng (Pte) Ltd ('the company') to strike out the winding-up petition filed against it on the ground that the proceedings it purported to have commenced should have been commenced by way of originating petition as they are not winding-up proceedings but proceedings for reliefs under s 216 of the Companies Act (Cap 50, 1985 Ed) ('the Act').

The petitioners, who are minority shareholders of the company, do not dispute that the petition has been presented as and subsequently advertised as a winding-up petition under the Companies (Winding up) Rules 1969 ('the Winding Up Rules'). They have also made an application to appoint provisional liquidators, which application has yet to be heard. As a result of this petition, the company had to make an application to court for certain validation orders under s 259 of the Act.

It is contended by counsel for the company that proceedings for any relief under s 216 must be commenced under O 88 of the Rules of the Supreme Court 1970 ('the 1970 Rules') and not under the Companies (Winding Up) Rules 1969. The relevant rules in O 88 are as follows:

> 2(1) Unless otherwise provided in the Act, and except in the case of the applications mentioned in Rules 3, 4 and 5, every application under the Act must, in accordance with Order 5, Rule 3, be made by originating summons.
>
> 5 The following applications under the Act must be made by petition, namely, applications -
>
> (h) under section 181 of the Act for relief in cases of oppression
>
> 7(1) After presentation of a petition by which any such application as is mentioned in Rule 5 is made, the petitioner, except where his application is one of those mentioned in paragraph (2), must take out a summons for directions under this Rule.
>
> (2) ...
>
> (3) On the hearing of the summons the Court may by order give such directions as to the proceedings to be taken before the hearing of the petition as it thinks fit including in particular, directions for the publication of notices and the making of any inquiry.

Counsel accordingly argues that by reason of r 5(h), the petition presented against the company as a winding-up

petition is an abuse of the process of the court and ought to be struck out under O 18 r 19 or O 92 r 4 of the 1970 Rules.

Counsel for the petitioners relies on O 1 r 2(2) of the 1970 Rules which provides as follows:

> (2) These Rules shall not have effect in relation to proceedings of the kinds specified in the first column of the following Table (being proceedings in respect of which rules may be made under the written law specified in the second column of that Table):
>
> TABLE
>
Proceedings	Written Law.
2 Proceedings relating to the winding up of of companies.	Companies Act, 1967 s 372

He contends that by reason of r 2(2), the present petition is correctly presented as a winding-up petition as one of the reliefs sought is the winding up of the company.

Accordingly, the primary issue before me is whether proceedings under a s 216 petition which includes an order for the winding up of the company are winding-up proceedings. If they are not, they cannot be presented by way of a winding-up petition. If they are, the further question arises whether the 1969 Rules or the 1970 Rules or both sets of Rules regulate such proceedings.

A s 216 action of the Act is generally known as an action for oppression. It enables a minority shareholder whose rights or interests have been prejudiced by oppressive acts of the directors or prejudicial or discriminatory acts of the company to apply to court for various reliefs to remedy such wrongs. One of the available reliefs as an alternative to others is the winding up of the company. A petitioner may seek such a relief but he need not, although in practice a petitioner usually includes it as an additional relief. However, where he does not seek this particular relief in an action based on s 216, it is impossible to characterize it as a winding-up petition or that the proceedings commenced thereby are winding-up proceedings. The petitioners here have sought such relief. Does that change the proceedings into winding-up proceedings?

The primary issue raises an important question of substantive law as to the nature of an action (which includes the winding-up relief) under s 216 of the Act. Its importance lies in the ensuing legal disabilities and consequences upon the commencement of winding-up proceedings against a company, its shareholders and directors and also outsiders who have dealings with the company: see ss 258, 259, 260, 261, 262(3), 267 and 335. As these provisions operate upon the commencement of winding-up proceedings against a company and as the winding up of a company commences at the time of presentation of the winding-up petition (except where before the presentation of such a petition a resolution has been passed by the company for voluntary winding-up, in which case the winding up commences at the time of the passing of the resolution: see s 255), it is vital for all parties whose rights may be affected thereby to know whether a petition presented under s 216 against a company is a winding-up petition.

The statutory provisions relating to the winding up of companies are enacted in Part X (comprising ss 247 to 354) of the Act. Section 254 sets out 13 grounds on any one of which a company may be wound up by the court. These grounds are not exhaustive under the Act as s 216 also empowers the Court to wind up a company, but they are exhaustive under Part X.

The legislative sources of the Act are derived from the companies' legislations of the United Kingdom and Australia. However, in both these countries, provision is made in the relevant statutes for the equivalent of a s 216 petition to be presented as a winding-up petition: see s 210(5) of the UK Companies Act 1948 ('the 1948 Act') and the Winding Up Rules 1949 made thereunder, and for Australia, McPherson, *The Law of Company Liquidation* (3rd Ed) at p 150. It is therefore not surprising that there is no English or Australian case law directly on this point. However, there are a number of Australian decisions where the courts have decided that for certain purposes a s 216 action under the Australian legislation could not be equated with a winding-up proceeding.

In *Re Australian Marinas (A'Asia) Pty Ltd*[1] the petitioner, having petitioned the court for an order under s 186 of the Companies Act 1961 (corresponding to s 216 of the Act), made an application for discovery of documents. Two questions arose for decision by the Supreme Court of Victoria: (1) whether it was proper to make the order against the company in proceedings under s 186 and (2) whether, if so, the discovery ordered should be more limited in extent than was asked for. On the first question, the practice then prevailing in England and in Australia was that, save in exceptional cases, the courts would not make discovery orders in winding-up petitions:[1] at pp 374-375. Adam J declined to follow the prevailing practice in winding-up proceedings and held that, as a general rule, the discovery of documents so far as reasonably material and relevant to the issues raised should be ordered in aid of the relief sought by a petitioner under s 186 of the 1961 Act. His Honour said (at p 375):

> Proceedings under s 186 are not, in truth, proceedings by a shareholder or shareholders for the winding up of their company but for appropriate orders with a view to bringing to an end oppression in the conducting of the affairs of a company to the prejudice of the petitioners. Although, as appears from the terms of s 186, the court has jurisdiction in proceedings under it to order the winding up of a company it should do so only if it appears the most appropriate of a number of alternative remedial orders that may be made to relieve against the oppression complained of, including the purchase of the shares by any members of the company or other members.

The same question came before the Master of the Supreme Court of New South Wales. His Honour allowed the application for discovery on the ground that a s 186 petition was not a winding-up petition. He said:

> There is no reported decision in this State dealing with the question of discovery in a petition under s 186. Indeed, the Australian *Marinas* case appears to be the only reported case in any State. In those circumstances I consider that the decision of Adam J is one which should be followed in New South Wales. The powers of the court under s 186 are much wider than the power to wind up the company. A great variety of orders can be made in respect of the shareholding of members, the conduct of the company's affairs in the future or for the reduction of the company's capital. Indeed, if one of these matters appears to be the appropriate remedy and it is the view of the court that the winding up of the company would unfairly prejudice the petitioners, it is bound not to make that winding up order. The nature of the remedies, it seems to me, gives the litigation commenced by a s 186 petition more of the character of litigation between the parties in respect of the rights inter se than does a petition to wind up where the only result can be the liquidation of a company, a matter which could affect a great number of people other than the company and the petitioner. I am of the view that in those circumstances the general practice of the court relating to litigation between individuals should be followed unless there are circumstances which would suggest a contrary order. Accordingly, I am of the view that it is appropriate upon an application for discovery to make that order upon the usual principles.

The third Australian decision that is relevant is *Re Tennyson Minerals No-Liability*.[2] In that case, Andrews J of the Supreme Court of Queensland held that the court had no power to appoint a provisional liquidator where a petition was filed under s 186 of the 1961 Act. The reported judgment does express the ground of the decision. However, as his Honour had also held that by reason of s 186(3) (which is in pari materia to s 216(3) of the Act) the provisions of the Act relating to winding up of a company had no application, the ruling would be explicable on the basis that the petition did not have the effect of commencing winding-up proceedings so as to enable the petitioners to apply for the appointment of a provisional liquidator.

There is, however, a Malaysian decision on the point. In *Re United Iron Mining Co Ltd*,[3] the petitioner, having filed an originating petition under s 186 of the Companies Act 1965 (which corresponds to s 216 of the Act), made an application under s 221(2)(e) of the 1965 Act (corresponding to s 257(2)(c) of the Act) to amend the petition. Chang Min Tat J dismissed the application on the ground that that section was only applicable to a winding-up petition and that a s 181 petition was not a winding-up petition. His Lordship said:

> Where a petition is made under s 181 for remedies for the relief of oppression of minorities and a prayer for a winding-up is only made in the alternative, I do not think, with respect, that such a petition can properly be called a winding up petition.

The judgment gives no guidance as to the nature of a winding-up proceeding for the purpose of the winding-up rules. The case could simply have been decided on the basis that since the petition had been filed as an originating petition under the Supreme Court Rules, it could not have been a winding-up petition. The above passage seems to suggest that the learned judge might have decided otherwise if the prayer for winding-up had not been made in the alternative: for example, if it had been as the sole or primary relief in the petition. As no other reason is given in the judgment, it is impossible to determine whether this is what the learned judge had in mind in referring to the prayer being made in the alternative. But, if this were the underlying reason for the decision, I would disagree with it. I do not think it matters how the reliefs in a s 216 are pleaded. Whether or not a proceeding is a winding-up proceeding cannot depend on the manner in which the relief is being sought. Accordingly, *Re United Iron Mining*[3] gives me little assistance in determining what is a winding-up proceeding.

In my view, there are good reasons why proceedings commenced under s 216 of the Act should not be regarded as a winding-up proceeding, notwithstanding the legal position in the United Kingdom and Australia. In the first place, s 216 of the Act departs from the English and Australian antecedents in significant respects. The historical development of s 216 is different from that of the English provision. Section 210 of the 1948 Act (which is in pari materia with s 186 of the 1961 Act) provides as follows:

> (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (3) of section one hundred and sixty-nine of this Act, the Board of Trade, may make an application to the court by petition for an order under this section.
>
> (2) ...
>
> (3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company concerned shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly.
>
> (4) ...
>
> (5) In relation to a petition under this section, section three hundred and sixty-five of this Act shall apply as it applies in relation to a winding-up petition, and proceedings under this section shall, for the purposes of Part V of the Economy (Miscellaneous Provisions) Act 1926, be deemed to be proceedings under this Act in relation to the winding up of companies.

This section was enacted to give effect to the recommendations of the Cohen Committee that alternative remedies be granted to minority shareholders who were oppressed by directors. Prior thereto, the traditional remedy in such circumstances was to petition for the winding up of the company on the ground that it was just and equitable to do so, but this remedy was in many cases worse than the oppression as the interests of the petitioners were equally affected. On account of the manner in which the remedies for oppression were developed, the foundation of a successful petition under s 210 remained the same: the petitioner had to show that the acts complained of justified the making of a winding-up order before the court could grant any of the remedies set out in s 210. For this reason, the wording of s 210 has been criticized. Professor LCB Gower, when drafting the corresponding s 218 of the Ghanaian Companies Act, chose to follow a wording which did not tie oppression actions to winding-up petitions: (see PN Pillai, *Sourcebook of Singapore and Malaysian Company Law*, 1975 at p 950 where the comments of Prof Gower are reproduced). Section 216 of the Act is modelled on s 218 of the Ghanaian Companies Act.

It is now convenient to turn to s 216 of the Act which provides as follows:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground -
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may -
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
> (b) regulate the conduct of the affairs of the company in future;
> (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
> (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
> (e) provide that the company be wound up.
>
> (3) Where an order that the company be wound up is made pursuant to paragraph (e) of subsection (2) of this section the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.
>
> (4), (5) & (6) (Not relevant).

It can be seen immediately when comparing s 210 of the 1948 Act and s 216 of the Act that there are significant differences between the two sections. For instance, s 216 does not in terms require, unlike s 210, that the facts would have to justify the making of a winding-up order on the ground that it is just and equitable to do so before the court may grant any of the prescribed remedies, including a winding-up order, with a view to bringing to an end the acts of oppression. It must therefore follow that under s 216 of the Act, the court may make a winding-up order to end the oppression even where the facts would not justify the making of such an order on the ground that it is just and equitable to do so. In other words, unlike s 210 of the 1948 Act, the basis for a successful action under s 216 as enacted is no longer subject to the overriding consideration that the facts must justify the winding up of the company on the ground that it is just and equitable to do so. Section 216 provides an entirely new ground for winding up a company, which is that the court finds that it is necessary to do so in order to end the oppression against the petitioners.

It is my view that, consonant with the object of s 216, a court in Singapore will not wind up a company on the ground of oppression where any of the other reliefs provided therein is a sufficient remedy to bring to an end the matters complained of, notwithstanding Lord Wilberforce's statement in *Re Kong Thai Sawmill*[4] that 'the option (ie winding up) ranks equally with the others'. The underlying object of s 216 is not to wind up the company but to end any acts of oppression against minority shareholders. A petitioner who seeks to wind up a company on the ground of oppression whether as the principal or only relief is not entitled to such an order even where he proves his case.

In *Re Kong Thai Sawmill (Miri) Sdn Bhd*[4] at p 229, Lord Wilberforce, in delivering the judgment of the Privy Council on the effect of s 181 of the Malaysian Companies Act, said:

> Section 210 [of the 1948 Act] is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of s 210, but is not the case under s 181.

The second reason why I think that proceedings under s 216 are not winding-up proceedings is that s 216, as enacted, unlike s 210 of the 1948 Act, has also expressly omitted the application of s 410(d) of the Act (which provides for the making of rules generally for the winding up of companies) to petitions under s 216. The intention behind the omission is not to bring a s 216 petition within the 1969 Rules and has been so understood by the Rules Committee when they made O 88 of the 1970 Rules specifically applicable to such petitions rather than the 1969 Rules.

The third reason for concluding that proceedings under s 216 even where the relief of winding-up is included are not winding-up proceedings is that a s 216 petition does not commence winding-up proceedings for the purpose of Part X of the Act, at any rate, not ab initio. Section 216(3) provides that where a winding-up order is made pursuant to sub-s(2)(f), the provisions of the Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the court by the company. The section does not expressly provide, as it could have done, that the petition is also deemed to have been presented at the date it is actually presented. Given the serious disabilities and consequences that follow upon the presentation of a winding-up petition, there is no justification for giving retrospective effect to the deeming words in s 21. They can be given effect to as they stand, which is that the date of commencement of the winding-up is the date of the winding-up order itself. There is no injustice to any party nor does it do any violence to the language of that subsection. It follows that until and unless the winding-up order is made, a s 216 petition when presented does not result in the commencement of the winding-up of a company. At that stage. there can be no winding-up proceedings against the company. A s 216 petition is therefore not a winding-up petition at the date of its presentation.

From the above analysis, a s 216 petition differs fundamentally from a s 254 petition in the following respects: firstly, in a s 254 petition, the only relief that is available and which can be claimed is a winding-up order. The petitioner is entitled ex debito justitiae to such an order where he proves the facts to support the ground of his petition. Although it is true to say that the right to wind up a company under a s 254 petition is a discretionary right, nevertheless the court may not, by its own principles, refuse such an order where the petitioners prove their case. The court may exercise its discretion in one way only, that is, to grant a winding-up order: see Upjohn LJ (as he then was) in *Re Prichard*[5] at p 520. In comparison, in a s 216 petition, the petitioner is not entitled as of right to wind up the company even where he proves oppression and even where the facts justify (although this is not a statutory requirement) a winding-up on the ground that it is just and equitable. A court will only wind up the company as a last resort, in order to give effect to the object of s 216.

In my view, a petition presented to wind up a company which does not entitle the petitioner to that relief even upon proof of this case is not a winding-up petition for the purposes of Part X of the Act or of the 1969 Rules.

It follows that the petitioners were in error in presenting the petition in these proceedings as a winding-up petition under the 1969 Rules. It should have been commenced and prosecuted as an ordinary companies' action by way of an originating petition as provided under O 88 r 5(h) of the Rules of the Supreme Court.

Even if I am wrong on this finding, it is my view that a s 216 petition is not a winding-up petition on its commencement and therefore must be presented as an originating petition under O 88 of the 1970 Rules. There is no overlapping between the 1969 Rules and the 1970 Rules in this respect.

I turn now to the third issue, that is whether the petition may be amended to come within the 1970 Rules. Counsel for the petitioners contend that any defect in the proceedings can be cured under O 2 r 1. It is not necessary to set out herein the text of the said Rule. What it does is generally to abrogate the distinction between irregularities and nullities and to provide by sub-rule (3) that:

> The Court shall not wholly set aside any proceedings or the writ or any originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

Counsel for the petitioners submits that the non-compliance in the present proceedings is an irregularity which can be cured by amending the title of this petition to that of an originating petition. I do not think this can be done under the 1969 Rules. This is the converse case of *Re United Iron Mining Co Ltd.*[3] Having presented this petition as a winding-up petition under the 1969 Rules, the petitioners may only apply to amend the petition under the 1969 Rules or the Act. They cannot rely on a different set of rules to set their petition right as the petition is not governed by those Rules. The 1969 Rules and the 1970 Rules are mutually exclusive in their operational effect. Order 2 of the 1970 Rules accordingly does not assist the petitioners. In regard to the 1969 Rules, r 191 provides that:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity, and the injustice cannot be remedied by any order of the Court.

Unfortunately, in my view, the aforesaid Rule is also of no assistance to the petitioners. The Rule cannot be used to change a winding-up petition into an originating petition.

The defect is a nullity and not an irregularity. As a winding-up petition, it will be dismissed in limine when it comes on for hearing. No amendment can rectify this defect. Secondly, if the defect were a formal defect or irregularity, I think that substantial injustice has been done to the company by the unavoidable impression given to the public that winding-up proceedings have been commenced against the company. In this respect, I do not agree with the argument of counsel for the petitioners that there was any waiver by the company of the irregularity by its application to court for validation orders. So long as the petition remains in the Registry as a winding-up petition, the company remains subject to all the statutory disabilities I have already mentioned.

For the above reasons, I order that the petition be struck out on the ground that it was improperly presented as a winding-up petition under the 1969 Rules. The petitioners will pay the costs of this application to be taxed.

Application allowed.

Solicitors: *Michael Khoo & BB Ong; Drew & Napier.*

Reported by *Terence Tan Bian Chye*

Ventura Navigation Inc v Port of Singapore Authority & Ors

HIGH COURT (SINGAPORE) - ADMIRALTY IN PERSONAM NO 343 OF 1987
CHAN SEK KEONG J
24 MAY 1989

Shipping - Oil pollution damage, liability for - Escape from non-oil tanker - Whether liability limited - Preliminary question of law - Prevention of Pollution of the Sea Act 1971, ss 3, 4, 5, 13 & 14 - Prevention of Pollution of the Sea (Amendment) Act 1981 - Merchant Shipping (Oil Pollution) Act 1981, ss 3, 4, 5, 6, 9 & 18 - Civil Liability (Oil Pollution) Act 1973, ss 3, 6(1) & 10 - Merchant Shipping Act (Cap 172, 1970 Ed), s 295 - Prevention of Oil Pollution Act 1971 [UK], s 15

Tort - Oil pollution - Escape of oil from ship - Measures taken to prevent and reduce oil pollution - Liability of shipowner for such measures

Civil Procedure - Preliminary point of law - Whether liability for measures to prevent and reduce oil pollution damage limited or unlimited

Words and Phrases - 'Ship' - 'Liability' - Merchant Shipping (Oil Pollution) Act 1981, s 18 - Prevention of Pollution of the Sea Act 1971, s 14

The plaintiffs were the owners of a motor tanker ('the ship') which ran aground on the edge of a reef due east of Batu Berhanti due to the admitted negligence of the servants or agents of the plaintiffs in the navigation or management of the ship. She was not carrying oil in bulk. The grounding ruptured the ship's tanks and oil escaped into the sea and was washed into the waters of Singapore. The first defendants and agents appointed by them therefore took measures to remove the oil to prevent and reduce the damage caused by oil pollution. The first defendants incurred expenses in so doing and are seeking to recover them under s 14 of the Prevention of Pollution of the Sea Act 1971, as amended by the 1981 amendment to the Act (collectively 'the PPSA 1971-81'). The oil pollution also caused damage and loss to the other defendants.

The dispute between the plaintiffs and the first defendants turns on the meaning of s 18 of the Merchant Shipping (Oil Pollution) Act 1981 ('the MSOPA') and its effect on s 14 of the PPSA. The issue as stated to the court as a preliminary point of law therefore concerned the liability of the plaintiffs to the first defendants. The plaintiffs claimed that the MSOPA and the PPSA were two statutory provisions which should be read as covering the same liability. The first defendants on the other hand claimed that the MSOPA dealt with oil pollution by oil tankers (which the ship was not), while the PPSA deals with oil pollution by non-oil tankers. The plaintiffs conceded that the claim of the first defendants was for the recovery of a statutory debt, but contended that the liability of the plaintiffs to the first defendants had been statutorily classified by s 18 of the MSOPA 1981 as damage coming within s 272(1)(d) of the MSOPA. The plaintiffs contended that their liability to the first defendants is a non-convention liability (since their ship is not an oil tanker), which is imposed by s 18(1) of the MSOPA 1981, and for that reason limited in extent by s 18(2).

The first defendants claimed that the word 'ship' was defined in s 2 to refer to all vessels carrying oil in bulk as cargo. The plaintiffs' ship, since it was not an oil tanker, did not therefore fall within the definition of 'ship' and therefore s 18 did not apply. Also the word 'liability' in s 18(1)(b) referred to a common law liability and not a statutory liability and therefore s 18 of the MSOPA 1981 did not apply and the liability of the plaintiffs to the defendants was not limited by s 18(2).

The plaintiffs argued that it was illogical to allow owners of oil tankers to restrict their liability but not owners of other ships. Notwithstanding the definition in s 2, the word 'ship' in s 18(1) should therefore be construed to mean any non-oil tanker as s 18 is intended to apply to non-convention liability. Since the plaintiffs are owners of such a ship, and have incurred such a liability, the plaintiffs' liability to the first defendants comes within the limitation of liability in s 18(2). The plaintiffs also claimed that the word 'liability' in s 18(1) covered the plaintiffs' statutory liability under s 14 of the PPSA 1971-81. In support of this, the plaintiffs said that the MSOPA 1981 and s 14 of the PPSA 1971-81 both came into force on the same day. The defendants claimed that the word 'liability' also covered liability at common law. The explanatory statement to the Bill for the PPSA 1971 supported this construction. The plaintiffs objected to reference being made to the explanatory statement on the grounds that it was prohibited.

Held, that the liability of the plaintiffs to the defendants was unlimited:

(1) The PPSA 1971 and the MSOPA 1981 are relatively new legislation in the field of environmental law enacted to regulate and impose liability on owners and operators of ships which discharge oil of any kind and other waste into or around Singapore waters thereby polluting the same and causing damage.